

**IN THE
SUPREME COURT OF MISSOURI**

No. SC87669

**INVESTORS TITLE COMPANY, INC.,
Plaintiff/Respondent/Cross-Appellant,**

v.

**JANICE HAMMONDS, *et al.*,
Defendants/Appellants/Cross-Respondents.**

**APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
CAUSE NO. 01CC-004336
DIVISION NO. 9
HONORABLE DAVID LEE VINCENT, III.**

**Second Substitute Brief of Respondent/Cross-Appellant
Investors Title Company, Inc.**

RIEZMAN BERGER, P.C.

**Nelson L. Mitten, #35818
Jennifer L. Geschke, #56623
7700 Bonhomme Avenue, 7th Floor
St. Louis, Missouri 63105
(314)727-0101
(314)727-6458 (fax)
Attorneys for Investors Title Company**

TABLE OF CONTENTS

TABLE OF CONTENTS1
TABLE OF AUTHORITIES3
ARGUMENT5

REPLY TO APPELLANT’S SECOND SUBSTITUTE BRIEF

VI. County has failed to rebut Investors’ argument that the Trial Court erred in giving Jury Instruction No. 10 because Investors is entitled to damages for five years prior to the filing of its Petition as the suit was against St. Louis County.5

VII. County has failed to rebut Investors’ argument that the Trial Court erred in granting Defendants’ motion for a directed verdict on Count V because Investors established that its due process rights were violated in that County overcharged Investors for services through its own established policies and practices and failed and refused to refund such overcharges.8

VIII. County has failed to rebut Investors’ argument that the Trial Court erred in granting Defendants’ motion for a directed verdict on Count VII because Investors produced sufficient evidence to establish a violation of Investors’ equal protection rights in that County unlawfully and intentionally discriminated against Investors by refusing to refund the overpayments made for County services, thereby treating Investors differently from other individuals and entities similarly entitled to a refund.12

IX. County has failed to rebut Investors’ argument that the Trial Court erred when it granted County’s motion for summary judgment on Count VIII (Negligence) and Count IX (Conversion) of Investors First Amended Petition because County’s Crime Policy did cover torts of this nature and thus County did waive sovereign immunity for these claims.15

CONCLUSION16

CERTIFICATE OF SERVICE18

CERTIFICATE OF COMPLIANCE19

APPENDIX20

TABLE OF AUTHORITIES

Cases

<i>City of Canton v. Harris</i> , 489 U.S. 378 (1989)	11
<i>City of Ellisville v. Lohman</i> , 972 S.W.2d 527 (Mo. App. E.D. 1998)	5, 6, 7
<i>City of St. Louis v. Praprotnik</i> , 485 U.S. 112 (1998)	10, 11
<i>Community Federal Savings and Loan v. Director of Revenue</i> , 752 S.W.2d 794 (Mo. 1988) (en banc)	13, 14
<i>Hudson v. Palmer</i> , 468 U.S. 517 (1984)	8, 9
<i>Johnson v. City of Minneapolis</i> , 152 F.3d 859 (8 th Cir. 1998)	12
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982)	8
<i>Lynch Properties v. Potomac Insurance Company of Illinois</i> , 140 F.3d 622 (5 th Cir. 1998)	16
<i>Monell v. New York City Dept. of Social Services</i> , 436 U.S. 658 (1978)	10, 11
<i>Parratt v. Taylor</i> , 451 U.S. 527 (1981)	9, 10
<i>Police Retirement System of St. Louis v. City of St. Louis</i> , 763 S.W.2d 298 (Mo. App. E.D. 1988)	14
<i>Putnam County v. Johnson</i> , 167 S.W. 1039 (Mo. 1914)	6
<i>Sam Kraus Co. v. State Highway Commission</i> , 463 S.W.2d 639 (Mo. 1967)	5
<i>Southeast Bakery Feeds v. Ranger Insurance Company</i> , 974 S.W.2d 635 (Mo. App. E.D. 1998)	16
<i>Weimer v. Amen</i> , 870 F.2d 1400 (8 th Cir. 1989)	10
<i>Wood v. County of Jackson</i> , 463 S.W.2d 834 (Mo. 1971)	5

Zinerman v. Burch, 494 U.S. 113 (1990)9, 10

Statutes

42 U.S.C. §19839, 10, 12

§136.035 RSMo.....13, 14

§516.120 RSMo 20005

§516.130 RSMo 20006

§537.610 RSMo16

ARGUMENT

VI. County has failed to rebut Investors' argument that the Trial Court erred in giving Jury Instruction No. 10 because Investors is entitled to damages for five years prior to the filing of its Petition as the suit was against St. Louis County.

Investors set forth in its substitute opening brief the established law that a five year statute of limitation period applies to claims for breach of contract against St. Louis County. *See Sam Kraus Co. v. State Highway Commission*, 416 S.W.2d 639, 640 (Mo. 1967) and *Wood v. County of Jackson*, 463 S.W.2d 834 (Mo. 1971). County does not dispute this law in its Second Substitute Brief. The three-year statute of limitations certainly does not apply to County, and the Trial Court erred in giving Jury Instruction No. 10. Rather, the five-year statute of limitations, §516.120 RSMo 2000, was the proper statute to apply. Section 516.120 RSMo 2000 states in pertinent part:

516.120. What actions within five years.

Within five years:

- (1) all actions upon contracts, obligations or liabilities, expressed or implied, except those mentioned in §516.110, and except upon judgments or decrees of the court of record, and except where a different time is herein limited...

County relies on *City of Ellisville v. Lohman*, 972 S.W.2d 527 (Mo. App. E.D. 1998) and argues that it held the three statute of limitation applies in this case. County reads the *City of Ellisville* decision too broadly. A close look at the case indicates that the issue decided was whether the Director of the Missouri

Department of Revenue was an “officer” as defined by Section 516.130.1 RSMo. *See City of Ellisville*, 972 S.W.2d at 534. The case contained no analysis of the question of whether a five year statute of limitations applies to actions against the County. Similarly, the facts of the other case chiefly relied upon by County, *Putnam County v. City of Johnson*, are distinguishable from the present case in that the suit was brought by Putnam County solely against John Johnson, the county clerk. *See Putnam*, 167 S.W. 1039, 1040 (Mo. 1914). A county, municipality, or other governing body was not a named defendant in *Putnam County*, as Investors has done in the present case.

There is no dispute that Janice Hammonds comes within the definition of “other officers” within the meaning of §516.130.1 RSMo. LF 41 at ¶2, LF 305 at ¶3. However, Count I was also brought against County, and was not merely based “upon a liability incurred by the doing of an act in [Recorder’s] official capacity and in virtue of [Recorder’s] office, or by the omission of an official duty” as stated by County. *See County’s Second Substitute Brief* at p. 39, citing *City of Ellisville*, 972 S.W.2d at 535. The services provided by the Recorder of Deeds Office are imposed and authorized under the authority of St. Louis County and/or the Charter of St. Louis County. LF 43 at ¶10, LF 305 at ¶1. The monies sought to be recovered were the funds of St. Louis County. Transcript at 97-98, 238 (Transcript is hereinafter abbreviated as “T”). Moreover, and as pointed to repeatedly by County, the actions which form the basis of liability were not all performed by Ms. Hammonds alone, but also other employees of St. Louis

County, i.e. Margaret King, as well as the other employees who failed to properly follow the procedures of St. Louis County and to properly monitor the payments made by Investors Title. *See, e.g.*, T at 52, 55-61, 66-67, 70, 85, 101-106, 140-141, 199-200; Ex.19, Cash Handling Procedures. Thus, the County has liability independent of the Recorder of Deeds. Upon these facts, the statute of limitations applicable to County applies, regardless of any statute applicable to the Recorder of Deeds.

By citing to *City of Ellisville*, County appears to suggest that the three year statute of limitations applies to any action by an employee of a county merely if they are acting carrying out the business of their respective employer. As a county can only act through its employees, this reading directly contradicts the holdings of *Sam Kraus Co.*, and its progeny and related cases which hold that the five year limitations period applies to actions against a county. Under this analysis, the three year statute of limitations would apply to all actions against a county. Such is not the law of the State of Missouri.

Count I was brought against County. The actions which form the basis of the liability against County involve actions by persons other than the Recorder of Deeds, and do not involve her official duties as the Recorder. As unrefuted evidence was presented illustrating damages suffered by Investors for a five year period of time, a solid evidentiary basis exists to remand the matter for entry of judgment for damages pursuant to the five year statute of limitations.

VII. County has failed to rebut Investors' argument that the Trial Court erred in granting Defendants' motion for a directed verdict on Count V because Investors established that its due process rights were violated in that County overcharged Investors for services through its own established policies and practices and failed and refused to refund such overcharges.

County argues that Investors failed to assert evidence that a County employee's inflated billing of Investors was actually authorized by County and therefore Investors failed to make a submissible due process claim. *See* County's Second Substitute Brief at p. 41. It is true that under some circumstances, an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). However, the court in *Hudson* also made reference to *Logan v. Zimmerman Brush Co.*, which held that a postdeprivation state remedy does not satisfy due process where the property deprivation is effected pursuant to an established state procedure. *Id.*, at 534 (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982)). In *Hudson*, the court noted that the Respondent did not allege that the asserted destruction of his property occurred pursuant to a state procedure. *Hudson* therefore, is distinguishable, in that Investors has asserted that the deprivation occurred ***due to County's procedure and policy, not just through a random unauthorized act by one employee.***

Hudson represents a special case in which postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide. See *Zinnermon v. Burch*, 494 U.S. 113, 128 (1990). The inquiry is “whether the *state* is in a position to provide for predeprivation process.” *Zinnermon*, 494 U.S. at 130 (citing *Parratt v. Taylor*, 451 U.S. 527, 534 (1981)). Here, the predeprivation process that County was in a position to provide was to follow its own procedures and audits, as set forth in the Cash Handling Procedures, to ensure that those utilizing the services provided by Recorder were properly charged. T at 101-102; Ex. 19, Cash Handling Procedures. Contrary to County’s argument, County did have notice that its policy and procedures were not being followed due to the mismatched amounts contained on the DK08 and BL02, which were forms generated daily as part of the audit package. T at 280-288; Ex. 14 and 15.

Even if the court finds that *Hudson* does apply to the instant case, a meaningful postdeprivation remedy for the loss was not and is not available to Investors in that even if Investors pursued a cause of action for fraud against King, collection of the amounts overcharged from King would have been impossible. Merely getting a judgment, without any hope of ever being able to collect on said judgment certainly does not constitute a *meaningful* postdeprivation remedy.

Regardless of whether a violation of procedural due process rights has been shown, Investors has established a violation of its substantive due process rights. A plaintiff may invoke §1983 for violation of substantive due process rights

regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights. *See Zinermon*, 494 U.S. at 125. When procedural due process claims under §1983 are barred by *Parratt*, claims based on the same actions but alleging denial of substantive due process should be barred as well. *Weimer v. Amen*, 870 F.2d 1400, 1406 (8th Cir. 1989). However, as stated above, *Parratt* and *Hudson* do not apply and therefore do not bar Investors’ procedural due process claims. Therefore, Investors substantive due process claims are also not barred.

Furthermore, as stated in Investors’ first brief, Investors has presented sufficient evidence that the conduct on the part of County did in fact “shock the conscience or otherwise offend our judicial notions of fairness.” *Weimer*, 870 F.2d at 1405. County cites *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1998) and *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 (1978), for the proposition that County cannot be liable under a theory of respondeat superior or vicarious liability. *See* County’s Second Substitute Brief at pp. 44-45. However, Investors is not seeking to make County liable under §1983 solely because it employed a tortfeasor. *See* County’s Second Substitute Brief at p. 50. Instead, Investors has alleged and presented sufficient evidence that County is liable for violating Investors’ due process rights because it was the “moving force” behind the injury.

As more fully addressed in Investors’ substitute opening brief, a municipality may be held liable under §1983 if the plaintiff shows that a “custom”

or “policy” of the municipality was the “moving force” behind the constitutional deprivation. *Monell*, 436 U.S. at 690-94. The Court has long recognized that a plaintiff may be able to prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is “so permanent and well settled as to constitute a custom or usage with the force of law.” *Praprotnik*, 485 U.S. at 127.

As previously argued in Investors substitute opening brief, County may also be held liable for inadequately training or supervising its employees. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989). One example cited by County for its assertion that Investors did not prove a failure to train or supervise is that “Defendant Recorder asked Ms. King if the policy was followed and Ms. King answered in the affirmative”. *See* County’s Second Substitute Brief at p. 50. This argument, as well as the others cited by Appellants, is extremely weak and in no way proves that King, or any County employee for that matter, was properly trained and supervised. Simply asking an employee whether they are following procedure without conducting any sort of follow up investigation regarding the same is absurd. County had notice that an employee was deviating from the policy and procedures by way of the mismatched numbers contained on the DK08 and BL02 forms. T at 280-288; Ex. 14 and 15. County’s failure to review these forms constitutes a deliberate indifference to its duty to train and supervise. County failed to supervise its employees by failing to follow through with the Cash Handling Procedures and utilizing the control features that were designed to

control and discover errors and irregularities in the cashier's office. T at 88-93, 114, 289-290.

County has failed to rebut Investors' arguments that the overcharging was the result of widespread practices, customs and polices of the Recorder's office and/or the intentional lack of supervision and training. As Investors has made a submissible case on Count V, a claim brought under 42 U.S.C. §1983 for violation of Investors' rights under the due process clause of the U.S. Constitution, the trial court erred in granting Defendants' motion for directed verdict and judgment notwithstanding the verdict.

VIII. County has failed to rebut Investors' argument that the Trial Court erred in granting Defendants' motion for a directed verdict on Count VII because Investors produced sufficient evidence to establish a violation of Investors' equal protection rights in that County unlawfully and intentionally discriminated against Investors by refusing to refund the overpayments made for County services, thereby treating Investors differently from other individuals and entities similarly entitled to a refund.

Investors has established that it was treated differently from others similarly situated, in that it is a member of a class of individuals and entities who made payments that exceeded properly charged fees and was denied a refund of the amounts overcharged. *See Johnson v. City of Minneapolis*, 152 F.3d 859, 862 (8th Cir. 1998). It is irrelevant that County had never before received a demand as large as the amount overcharged to Investors. County had a procedure for

providing refunds of overpayments and County's cash management procedures and manuals specified a \$10 lower limit on County's obligation, but did not specify an upper cap on repayments. T at 117-122. The evidence established that others entitled to a refund received such a refund from County. See Ex. 21, Special Transit Reports (showing refunds to hundreds of other title companies).

County cites *Community Federal Savings and Loan v. Director of Revenue*, 752 S.W.2d 794 (Mo. 1988) (en banc) for the assertion that timeliness requirements for refunds are rational and failure to demand a refund in a timely manner is a rational basis for refusal to issue refunds. First and foremost, *Community Federal Savings and Loan* does **not** involve an equal protection claim. Secondly, County's assertion of the Court's holding, that it is lawful for a state to deny a refund because the claim for the refund was not timely, is completely erroneous. See *Community Federal Savings and Loan*, 752 S.W.2d 794; and County's Second Substitute Brief at p. 59.

Section 136.035 was at issue in *Community Federal Savings and Loan*, which allows for the Director of Revenue to refund taxes under certain circumstances. Id. The Court construed §136.035 RSMo and came to the conclusion that the State of Missouri has consented to a refund of any overpayment, erroneous or illegal payment, which would include a tax declared unconstitutional, of any tax on intangible personal property by the terms of §136.035, and that all appellants in that case who had followed the proper

procedures for applying for a refund as set forth in the statute were entitled to a refund of the overpayment, erroneous or illegal payment. *Id.*, at 798.

County has failed to recognize that the timeliness requirements at issue in *Community Federal Savings and Loan* were set by statute.¹ In the instant case, the County's cash management procedures and manuals did not specify a time limit on either unsolicited or solicited refunds. T at 118; Ex. 20, Notice of Refund Policy.

County also asserts that "budget restraints and fear of creating insolvency due to unfunded, unforeseen liability are rational bases for treating individuals differently without violating the Equal Protection Clause." *See* County's Second Substitute Brief at p. 59, citing *Police Retirement System of St. Louis v. City of St. Louis*, 763 S.W.2d 298, 301 (Mo. App. E.D. 1988). The liability in question was foreseeable in that the overcharges could have been prevented had County merely followed its cash management policies and procedures instead of blatantly ignoring the preventative measures it had in place for at least six years.

Furthermore, although there was no specific evidence that County had funds budgeted to pay the refund owed to Investors, there was evidence that County had the ability to refund the overpayments. Additionally, there was no

¹ Section 136.035.3 states in part: "[N]o refund shall be made by the director of revenue unless a claim for a refund has been filed with him within two years from the date of payment." §136.035 RSMo.

evidence suggesting that refunding the overpayments would create an unfunded liability and impair County funds. In fact, the evidence is clear that County had in place an insurance policy, covering actions of its employees, including those within the Recorder of Deeds Office. LF at 64, 68-116.

County failed to rebut Investors' argument that County discriminated against Investors and treated its demand different for invalid reasons. Investors made a submissible case that its equal protection rights were violated and the trial court therefore erred in granting Defendants' motion for directed verdict and judgment notwithstanding the verdict as to Count VII.

IX. County has failed to rebut Investors' argument that the Trial Court erred when it granted County's motion for summary judgment on Count VIII (Negligence) and Count IX (Conversion) of Investors First Amended Petition because County's Crime Policy did cover torts of this nature and thus County did waive sovereign immunity for these claims.

The County purchased an insurance policy covering actions of its employees which covers Investors' claims, and thus waives sovereign immunity for both Investors' claims for conversion and negligence. LF 64 at ¶31, at 68-116.

The Crime Policy states that the insurer will not pay for loss or damages for which County is legally liable as a result of "the tortuous conduct of an 'employee', **except** conversion of property of other parties held by [County] in any capacity." LF 91 at ¶e(2). Even if it is true that County was not a bailee or trustee of the checks tendered to County by Investors, in order for liability

coverage to apply, County merely had to hold the tendered checks in *any capacity*. As the Crime Policy requires the insurer to discharge an obligation of County, the insured, to Investors, a third party, for the tortuous conduct of an employee, in this case conversion, the Crime Policy is a liability policy. *See Lynch Properties v. Potomac Insurance Company of Illinois*, 140 F.3d 622, 629 (5th Cir. 1998).

In construing an insurance policy, the court looks at the contract as a whole and considers the language in the context of the policy. *Southeast Bakery Feeds v. Ranger Insurance Company*, 974 S.W.2d 635, 639 (Mo. App. E.D. 1998). A careful reading of the Crime Policy leads to the conclusion that it is a liability policy covering Investors' claims, as is required for a waiver of sovereign immunity pursuant to §537.610 RSMo. County has failed to rebut Investors' arguments that the Crime Policy covered the allegations contained in Counts IV and VIII of Investors' First Amended Petition and therefore the trial court erred in granting County's motion for summary judgment on these counts. This court should reverse the trial court's decision and remand this case for a new trial on Counts IV and VIII.

CONCLUSION

The Judgment and Amended Judgment should be reversed as stated in Point VI, with instructions to set aside the verdict of the jury and to enter judgment in favor of Plaintiff for damages pursuant to a five year statute of limitations period. For the reasons stated in Points VII and VIII, the trial court's order sustaining Defendants' motion for a directed verdict should be set aside, with

instructions to enter judgment in favor of Plaintiff or in the alternative to grant Plaintiff a new trial. Finally, for the reasons set forth in Point IX, the trial court's grant of summary judgment on Investors' claims for conversion and negligence should be set aside, and this Court should reverse and remand this case for a new trial.

RIEZMAN BERGER, P.C.

By: _____
Nelson L. Mitten, #35818
Jennifer L. Geschke, #56623
7700 Bonhomme Avenue, 7th Floor
St. Louis, Missouri 63105
(314) 727-0101
(314) 727-6458 (fax)
Attorneys for Investors Title

CERTIFICATE OF SERVICE

I hereby certify that one copy of this brief and a 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief were mailed, postage prepaid, this 23rd day of August, 2006 to:

Patricia Redington
Cynthia Hoemann
Micki Wochner
County Counselor
41 South Central Avenue
Clayton, Missouri 63105

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word XP 2002 and contains 3,665 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 13-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

APPENDIX TABLE OF CONTENTS

Section 136.035 RSMoA1